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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARCIO DE SOUSA,)	
)	
Plaintiff,)	No. C00-4715 BZ
)	
v.)	ORDER GRANTING DEFENDANTS'
)	MOTION FOR SUMMARY JUDGMENT
CHARLES DEMORE, et al.)	AND DENYING PLAINTIFF'S
)	MOTION FOR SUMMARY JUDGMENT
Defendants.)	
)	
_____)	

Plaintiff seeks a declaratory judgment that the District Director ("Director") abused his discretion when he denied plaintiff's request for reinstatement of his F-1 non-immigrant student status. This court has jurisdiction pursuant to the Administrative Procedures Act. See 5 U.S.C. § 702; Ghorbani v. I.N.S., 686 F.2d 784, 791 n.16 (9th Cir. 1982).¹ Both plaintiff and defendants now move for summary judgment under

¹ The parties have consented to the jurisdiction of a United States Magistrate Judge for all proceedings including entry of final judgment pursuant to 28 U.S.C. § 636(c).

1 Federal Rule of Civil Procedure 56(c). Because there are no
2 genuine issues of material fact, the parties are entitled to
3 judgment as a matter of law. See Anderson v. Liberty Lobby,
4 477 U.S. 242, 248 (1986).

5 Plaintiff entered the United States as an F-1 non-
6 immigrant student in 1994 and enrolled as a full time student
7 at Chabot College beginning in the fall of 1996. On June 2,
8 1999, plaintiff married and his spouse petitioned for
9 adjustment of his status to a lawful permanent resident.
10 Pursuant to the pending application for adjustment of his
11 status, plaintiff received employment authorization.
12 Plaintiff continued to attend Chabot College but did not
13 enroll as a full time student for the Fall 1999 and Spring
14 2000 semesters. During the spring of 2000, plaintiff
15 separated from his wife, and she eventually withdrew her visa
16 petition. As a result, defendants denied plaintiff's
17 adjustment of status application on July 31, 2000, giving
18 plaintiff 18 days to respond. On August 14, 2000, plaintiff
19 responded by requesting defendants to reinstate his F-1 non-
20 immigrant student status. On November 20, 2000, defendants
21 denied plaintiff's request. Plaintiff now challenges the
22 merits of the Director's decision to deny his reinstatement.

23 "The grant or denial of reinstatement . . . is within the
24 discretion of the Attorney General and his delegate, the
25 District Director." Shamsian v. Ilchert, 534 F. Supp. 178,
26 182 (N.D. Cal. 1982). The district court reviews the
27 Director's decision for an abuse of discretion. See Tooloee
28 v. I.N.S., 722 F.2d 1434, 1437-38 (9th Cir. 1983). "The

1 District Director's decision must stand unless it so departs
2 from an established pattern of treatment of others similarly
3 situated without reason, as to be arbitrary and capricious,
4 and an abuse of discretion." Shamsian, 534 F. Supp. at 182
5 (citing Nicholas v. I.N.S., 590 F.2d 802, 808 (9th Cir.
6 1979)).

7 The Director's denial states that plaintiff was denied
8 reinstatement because he failed to maintain a full course of
9 study and refers plaintiff to his school transcript. (Defs.'
10 Cross-Mot. for Summ. J., Ex. B).² Plaintiff contends that he
11 was in substantial compliance with student regulations, and
12 therefore was entitled to reinstatement or, at the very least,
13 a right of adjudication and review of his application.
14 Specifically, plaintiff argues that because he was in
15 compliance with the employment authorization issued to him
16 while he was a conditional permanent resident based upon his
17 marriage, he did not have to maintain his status as a full
18 time student. Substantial compliance with the requirements
19 for immigrant status as a conditional permanent resident, even
20 if true, cannot excuse plaintiff's failure to maintain a full
21 course of study pursuant to his student status. The intent
22 for status as a conditional permanent resident and as a non-
23 immigrant student are mutually exclusive; the former
24 encompasses a desire to permanently remain in the United
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27 ² It is harmless error that the Order inaccurately states
28 the time period within which plaintiff failed to pursue a full
course of study. It is undisputed that for two semesters
within the time period listed on the Order, plaintiff's course
load fell beneath the required twelve credits.

1 States while the latter does not. Moreover, the two sets of
2 requirements are separate and independent. Compare 8 C.F.R. §
3 245 with 8 C.F.R. § 214.2(f). Compliance with the
4 requirements for being a conditional permanent resident does
5 not constitute substantial compliance with the requirements
6 for being a non-immigrant student. See, e.g., Ghajar v.
7 I.N.S., 652 F.2d 1347, 1348 (9th Cir. 1981) (holding that
8 substantial compliance with the requirements for maintaining
9 non-immigrant student status under 8 C.F.R. § 214.2(f) does
10 not constitute substantial compliance with the requirements
11 for obtaining an extension of stay under 8 C.F.R. § 214.1(c)).
12 Here, plaintiff violated specific regulations governing non-
13 immigrant students by allowing his course load to fall beneath
14 the necessary twelve credits. See 8 C.F.R. §§
15 214.2(f)(5)(I); (f)(6)(I)(B). That plaintiff may have been
16 complying with requirements applicable to conditional
17 permanent residents does not excuse his failure to comply with
18 regulations governing non-immigrant students.

19 Plaintiff also claims that the Director abused his
20 discretion by failing to fully consider his application for
21 reinstatement of his student status. As proof, plaintiff
22 points to an alleged absence of records in the file upon which
23 the Director could have based his denial, which plaintiff
24 claims violated Immigration and Naturalization Service ("INS")
25 regulation 8 C.F.R. § 214.2(f)(1)(ii). This regulation,
26 however, governs the manner in which the INS services student
27 admissions rather than the manner in which the INS keeps
28 students' records. Indeed, there appears to be no regulation
that specifically address the record-keeping burden that the

1 INS may possess with respect to non-immigrant student records.

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3 I find that the Director had to have reviewed the transcript
4 before making his determination which on its face refers to
5 the transcript. That the transcript was not produced in
6 response to plaintiff's FOIA request does not undermine this
7 finding.

8 Lastly, plaintiff argues that the INS should be estopped
9 from taking adverse action against a non-immigrant student
10 because he relied to his detriment on INS representations.
11 "Estoppel may be invoked only if the governmental conduct
12 constitutes 'affirmative misconduct.'" Bolourchian v. I.N.S.,
13 751 F.2d 979, 980 (9th Cir. 1984) (quoting I.N.S. v. Hibi, 414
14 U.S. 5, 8 (1973) (per curiam)). Plaintiff has failed to
15 identify any representations that may be held to constitute
16 affirmative misconduct.

17 Although a student who fails to maintain his student
18 status may obtain reinstatement under 8 C.F.R. §
19 214.2(f)(16)(I), the decision is left to the discretion of the
20 Director. I find that the Director did not abuse his
21 discretion in denying plaintiff's reinstatement due to
22 plaintiff's failure to maintain twelve credits during the Fall
23 1999 and Spring 2000 semesters. Plaintiff's "[a]fter the fact
24 justification does not excuse his failure to comply with INS
25 prior approval regulations, of which he had clear notice."
26 Ghorbani, 686 F.2d at 786.

27 Accordingly, **IT IS HEREBY ORDERED** that plaintiff's motion
28 for summary judgment is **DENIED** and defendants' cross-motion

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3 for summary judgment is **GRANTED**.

4 Dated: October 31, 2001

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 Bernard Zimmerman
 United States Magistrate Judge

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